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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| MONIQUE VIOLETTE, et al.,<br>Plaintiffs and Appellants,<br>v.<br>CHAPMAN TOWNHOMES, INC.,<br>Defendant and Respondent. | G055954<br>(Super. Ct. No. 30-2017-00910404)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Nathan R. Scott, Judge. Reversed.

Smith Hall Strongin and Eric B. Strongin for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Charles L. Harris, Ernest Slome, and Joseph V. Miceli for Defendant and Respondent.

* * *

Every appeal centers on the claim that someone erred. This is the rare case in which we are forced to conclude that everyone did.

Chapman Townhomes, Inc. (Chapman) demurred to four out of the five causes of action alleged against it, and then supported its demurrer with a memorandum of points and authorities that addressed only three of the four causes of action it demurred to, while also addressing the one it did not.

Plaintiffs Monique Violette and her two minor children (collectively Violette) failed to file any opposition to the demurrer filed by Chapman and to attend the hearing.

The trial court sustained Chapman's demurrer, and then tentatively agreed with Chapman's suggestion that its ruling would resolve all the causes of action alleged against Chapman. But, although the court stated orally at the hearing that it was also denying Violette leave to amend her complaint, it later entered a minute order granting her leave to amend. That minute order was the only order Violette was made aware of.

In response, she promptly filed a motion for relief from the order sustaining the demurrer, citing attorney error for the failure to oppose it, and asking to have her opposition considered. Unfortunately, the earliest available hearing date was four months off. Meanwhile, Chapman submitted a formal ruling stating—incorrectly—that its demurrer was sustained as to all five causes of action alleged against it. The trial court then signed that incorrect order, as well as the concurrently submitted judgment.

Faced with that entry of judgment, Violette moved for an ex parte order vacating the judgment, modifying the court's order sustaining the demurrer with leave to amend, and allowing her to file a proposed first amended complaint. In the alternative, she requested that the court advance the hearing on her pending motion for relief from the demurrer ruling, pointing out that her time to appeal from the judgment would expire before the hearing date on that motion. The court denied Violette's ex parte application, and this appeal followed.

Violette argues the court erred by sustaining the demurrer based solely on her failure to oppose it, and that on the merits, it erred by denying her leave to amend. We are reluctant to conclude the trial court failed to consider the merits of a demurrer; however, that may be the case here as the court entered judgment based on a demurrer that addressed fewer than all the causes of action alleged against Chapman. For that reason alone, the judgment must be reversed.

We also conclude the court erred by sustaining Chapman's demurrer on the four causes of action it did challenge without leave to amend. Unless allegations on the face of the complaint suggest a cause of action cannot be amended, it is an abuse of discretion for the court to deny the plaintiff leave to amend at least once. Here, Chapman did not even argue that the challenged causes of action were incapable of amendment.

Because we conclude the court erred in sustaining Chapman's demurrer without leave to amend, and in entering judgment in its favor, we need not address Violette's additional claims relating to error in the denial of its ex parte application and motion for relief from the demurrer ruling.

## FACTS

As this appeal is taken from a judgment following an order sustaining a demurrer without leave to amend, we take many of our facts from the challenged pleading.

Violette and her children lived in a condominium owned by Ingeborg Emmy Kane, Michael Fritz Beier and Sandra Ingrid Kane, as trustees of the Ingeborg E. Kane Family Trust (the landlord defendants). Chapman is a corporation alleged to be "the owner of, and responsible with maintaining, managing, repairing and operating those common areas that affected" the leased condominium.

The complaint alleges that Chapman, along with the landlord defendants "failed to maintain and repair the Property, in that, among other things: the plumbing was inadequate and defective; the building permitted intrusion of water into its interior, including through the slab foundation; the Property contained improper and ineffective repairs; the Property contained leaking plumbing; the Property suffered from water intrusion throughout the exterior building envelope; the ceilings of the Property leaked; the Property contained leaking tubs, faucets and other fixtures; the Property was damp; the Property contained harmful levels of formaldehyde and other toxic substances; the Property contained harmful and toxic mold, fungi and other contaminants/pollutants and was not properly maintained, remediated and/or repaired."

In May of 2016, Violette allegedly "suspect[ed] that the presence of mold at the Property [was] causing her and her children's injuries and sickness, [and she] moved out of the Property to a hotel—taking her two children . . . with her."

Violette further alleges she "notified the Defendants, both orally and in writing, of the defective and dangerous conditions of the Property, and requested that Defendants have them repaired/remediated/corrected. . . . Defendants had actual and constructive notice of the defective and dangerous conditions at the Property since Defendants had previously attempted to repair, inspect or view the conditions at the Property by virtue of their visits to the Property. Despite these requests, and Defendants' knowledge of the defective and dangerous conditions as described in this complaint, Defendants failed and refused to adequately or properly repair or address the conditions and defects at the Property, and have failed to timely repair the Property and/or have done so in a negligent and/or unreasonable fashion."

In May of 2016, Violette "paid to have the property tested and inspected for mold contamination," and "[t]he lab results came back positive for the presence of Stachybotrys Chartarum—a fungus that has become notorious as a mycotoxin producer that can cause human mycotoxicosis." Subsequent testing revealed "microbial

growth . . . on plumbing, cabinet, wall components and surfaces," along with deteriorated and/or damage[d] seals on plumbing and water basin components . . . ."

According to the complaint, "[d]amage appeared to be originating from an active water leak within the plumbing components present in the ceiling cavities above the dining room area. In addition, heavy staining and moisture was observed on carpeting in the living room area which was from a leak in the foundation slab. Carpeting was pulled back revealing extensive microbial/mold/fungal growth. Significant damage was also found on wall finishes and cabinet components, all of which indicated excessive moisture intrusion into the Property causing microbial growth. A moisture meter was also used which detected extremely high levels of moisture on building surfaces throughout the Property. Samples were collected at the Property in connection with the inspection and were submitted to a certified laboratory for identification. These results revealed extremely high levels of toxic mold, including Stachybotrys (black mold), Aspergillus, Penicillium and others."

Violette allegedly deducted the cost of mold testing from her rent payment, and the landlord defendants evicted her from the Property, later auctioning off her personal belongings.

In March 2017, Violette filed a complaint against the landlord defendants and Chapman. Violette alleged causes of action against Chapman for breach of warranty of habitability (first cause of action), nuisance (second cause of action), negligence (fourth cause of action), intentional infliction of emotional distress (seventh cause of action), and negligent infliction of emotional distress (eighth cause of action).

In July 2017, Chapman demurred to the first, fourth, seventh and eighth causes of action alleged against it, on the grounds that each of those causes of action failed to state facts sufficient to constitute a cause of action and was "otherwise uncertain." It did not demur to the second cause of action alleging nuisance. In its supporting memorandum of points and authorities, Chapman argued the complaint failed

to state a cause of action for nuisance (the cause of action not included in its demurrer), while ignoring the fourth cause of action alleging negligence (which it did demur to).

Chapman also moved to strike the words "punitive" and "exemplary" from the damage allegations contained in Violette's cause of action for intentional infliction of emotional distress, arguing Violette had not pleaded sufficient specific factual allegations to justify an award of punitive or exemplary damages.

The hearing on Chapman's demurrer and motion to strike was set for November 2017. Violette did not file opposition to either motion. Ten days before the hearing, Chapman's new counsel filed and served a "Notice of Non-Opposition" in connection with both motions.

Violette's counsel did not appear at the hearing on Chapman's demurrer and motion to strike. The court's minute order noted it was informed Violette's counsel tried to get permission to appear telephonically via CourtCall, "but Court was already in session at the time," and thus the court would not allow it. The court then informed Chapman's counsel "[s]o, Mr. Miceli, your client's demurrer is sustained without leave to amend. Your motion to strike, to the extent it requires any separate ruling, would be granted without leave to amend." In response, Chapman's counsel stated "I believe that would dispense of the causes of action pled against my client," and the court replied "I think it just might."

Chapman's counsel then suggested, "given the nature of this ruling, the fact that it would essentially terminate the case against my client, I would like to prepare a proposed order and submit it to the court for signature." The court agreed, adding that "if some separate judgment of dismissal becomes appropriate, you can prepare that too. Just make sure to prepare a separate document."

Despite the court's oral ruling, stating it was sustaining Chapman's demurrer without leave to amend, its minute order issued after the hearing specified the court was sustaining Chapman's demurrer *with* leave to amend and granting the motion to strike. The minute order also directed Chapman to submit a proposed order.[1]

Four days after the hearing, Violette filed a motion seeking mandatory relief based on attorney error. In support of the motion, Violette's counsel explained that he had prepared oppositions to Chapman's demurrer and motion to strike, but erroneously failed to ensure they had been filed while he was engaged in trial in a different case. Counsel also explained he had arranged to appear telephonically for a prior hearing in this case that was continued to the date of Chapman's demurrer and motion to strike. He stated he was unaware until he called in for his appearance that the earlier CourtCall reservation did not carry over to the new date.[2] Unfortunately, the earliest available hearing date for Violette's motion for relief was not until four months later.

Meanwhile, Chapman submitted a proposed order inaccurately stating that the court had sustained its demurrer as to all five causes of action alleged against it, without leave to amend; Chapman at the same time submitted a proposed judgment based on that incorrect order. The trial court signed both the incorrect order and the judgment.

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[1] "A trial court's oral ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes. [Citations.] Accordingly, the trial court may properly file a written order differing from its oral rulings when the rulings have not been entered in the minutes of the court." (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.)

[2] What Violette's counsel does not acknowledge is that he failed to call in for the prior telephonic appearance he had arranged through CourtCall. It is not clear from the court's order whether it was that failure which caused the court to continue the earlier hearing.

Faced with entry of judgment, Violette filed an ex parte application to vacate the judgment and to modify the court's order sustaining Chapman's demurrer with leave to amend and to allow the filing of her proposed first amended complaint.[3] In the alternative, she requested that the court advance the hearing on her pending motion for relief from the court's order sustaining the demurrer. She pointed out that ex parte relief was necessary because her time to appeal from the judgment would expire before the hearing date on her pending motion for relief. The court denied Violette's ex parte request in its entirety. This appeal followed.

## DISCUSSION

1. *Law Applicable to Demurrers and Standard of Review*

A demurrer is a pleading used to test the legal sufficiency of other pleadings. (Code Civ. Proc, § 422.10.) "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint . . . are taken. Unless it does so, it may be disregarded." (Code Civ. Proc., § 430.60.) Additionally, "[e]ach ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses." (Cal. Rules of Court, rule 3.1320(a).)

On appeal, "[w]e review de novo the trial court's order sustaining a demurrer." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1468.) In doing so, this court's only task is to determine whether the complaint states a cause of action. (*Gentry v. eBay, Inc*. (2002) 99 Cal.App.4th 816, 824.) "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material

[3] In the proposed first amended complaint, Violette again alleged causes of action for breach of warranty of habitability, nuisance, intentional infliction of emotional distress and negligent infliction of emotional distress against Chapman, and added new causes of action for fraud and concealment and negligent misrepresentation.

facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]'" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) However, "[i]f the factual allegations of the complaint state a cause of action on any available legal theory, the trial court's order of dismissal must be reversed." (Gentry v. eBay, Inc. (2002) 99 Cal.App.4th 816, 825.)

Additionally, "[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a).) In addressing that question, we are mindful that "it is an abuse of discretion to sustain a demurrer to an original complaint without leave to amend unless disclosures on the face of the complaint point to its being incapable of amendment." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 8; *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 ["Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given"].)

2. *Merits of the Order*

In its order, the trial court purported to sustain Chapman's demurrer to all five causes of action alleged against it by Violette, without leave to amend. But as we have already explained, Chapman demurred to only four out of those five causes of action. Chapman did not challenge Violette's second cause of action for nuisance. The court has no authority to sustain a demurrer which was never filed. Consequently, on that basis alone, the court's order—along with the judgment of dismissal based thereon—is fatally flawed.

Moreover, we conclude the trial court abused its discretion by denying Violette leave to amend her other causes of action. California Rules of Court, rule 3.1320(f), requires that general demurrers must be resolved "on the merits" if a party fails to appear. This record does not support a finding of compliance with that rule.[4]

A. *Breach of Implied Warranty of Habitability*

We focus first on the court's ruling related to Violette's cause of action for breach of the implied warranty of habitability, since it is the only cause of action Chapman suggests is fatally flawed.

Our Supreme Court recognized in *Green v. Superior Court* (1974) 10 Cal.3d. 616, 629 that there is a warranty of habitability implied by law into every residential lease. "The implied warranty of habitability recognizes 'the realities of the modern urban landlord-tenant relationship' and imposes upon the landlord the obligation to maintain leased dwellings in a habitable condition throughout the term of the lease." (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1204.)

Chapman contends that because it is not Violette's landlord, and has not entered into any residential lease agreement with her, there is no basis for the law to infer it could be bound by a warranty of habitability. Violette responds that Chapman can be held liable as a "landlord" on her cause of action for breach of the implied warranty of habitability because "a condominium or homeowners' association is 'held to a landlord's standard of care as to the common areas under its control.'" (Citing *Frances T. v. Village Green Owners Assn*. (1986) 42 Cal.3d 490, 499-500.)

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[4] The court prepared no tentative ruling in advance of the hearing, which it noted was unusual. It also offered no comment on the merits of the demurrer before sustaining it, and it failed to comply with Code of Civil Procedure section 472d in its ruling.

Violette's argument conflates the elements of tort liability for negligence with the elements of contractual liability for breach of an implied term in a lease. While it is true that "[t]raditional tort principles impose on landlords, including homeowners associations, that function as landlords in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control" (*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103, 119-120), that does not establish that a homeowners association would be obliged to warrant that the common areas under its control are "habitable," or to assume any separate responsibility to warrant the habitability of the individual dwelling unit that it neither owns nor leases to the tenant.

For these reasons, we agree with Chapman that Violette cannot state a cause of action for breach of the implied warranty of habitability by simply alleging Chapman is the owner of common areas and is thus effectively the "landlord" of those areas. Nor can Violette simply lump Chapman in with the landlord defendants and claim it is liable for warranting the habitability of her individual unit. Thus, we conclude the trial court did not err by sustaining Chapman's demurrer to the cause of action for breach of the implied warranty of habitability.

On the other hand, Chapman does not explain why Violette could not conceivably state such a cause of action against the entity which is—at least for some purposes—the "landlord" of the Property's common areas. We are also mindful that Violette has not been given any opportunity to amend this cause of action to allege additional facts which might be sufficient to demonstrate how Chapman's ownership and control over the common areas would give rise to an implied warranty of habitability affecting either those common areas or the individual unit she leased, and if so, how that distinct warranty was breached in this case. We consequently conclude she must be given that opportunity. (*Angie M. v. Superior Court, supra*, 37 Cal.App.4th at p. 1227

["Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given"].)

B. *Other Causes of Action*

The remaining causes of action Chapman demurred to were for negligence as well as both negligent and intentional infliction of emotional distress. Violette alleges Chapman owed her a duty to maintain the common areas in a safe condition and a duty to warn her of dangerous conditions, in addition to other unspecified duties.

Each of these causes of action is stated in conclusory terms and suffers significantly from the fact that each is alleged jointly against Chapman and the landlord defendants and then incorporates by reference every factual allegation made against each of these parties. That over-inclusive pleading style, while not uncommon, makes it nearly impossible to ascertain what liability Violette is alleging against only Chapman, or whether Chapman's liability is legally shared with the landlord defendants, derives from the landlord defendants' alleged acts or omissions, or is grounded on Chapman's distinct acts or omissions.

For example, in her negligence cause of action, Violette alleges that "Defendants [referring to Chapman and the landlord defendants] acted negligently and have breached their duties to Plaintiffs by committing the acts and engaging in the conduct alleged in this complaint," and that as a result of their collectively negligent acts, she and her children have "incurred legal expenses, medical expenses, suffered permanent and debilitating injuries to their persons, suffered loss or damage to personal property, consequential and incidental damages and suffered mental and emotional distress." At no point does Violette link any of Chapman's specific acts or omissions with a specific duty of care Chapman is alleged to have breached, nor does she clarify why Chapman, specifically, would be liable for any or all of the listed harms.

Violette's causes of action for negligent and intentional infliction of emotional distress suffer from similar flaws. She again incorporates the collective acts of both Chapman and the landlord defendants into both causes of action and alleges they were "extreme and outrageous and have caused Plaintiffs to suffer severe emotional mental distress." She makes no effort to segregate Chapman's alleged acts from those of the landlord defendants, alleging instead that "[a]ll such damages were proximately caused by Defendants' acts." Here again, the complaint fails to adequately inform Chapman as to the basis of its distinct liability.

However, as with the cause of action for breach of the implied warranty of habitability, Chapman's demurrers to the negligence and emotional distress causes of action were based on the assertion Violette had not adequately pleaded them. Chapman did not argue the causes of action were legally foreclosed. Under these circumstances, we conclude the trial court abused its discretion by sustaining the demurrers to these causes of action without leave to amend.

## DISPOSITION

The judgment is reversed, and the trial court's order sustaining Chapman's demurrer and motion to strike without leave to amend is vacated. The case is remanded to the trial court with directions to enter a new order sustaining Chapman's demurrers to Violette's first cause of action for breach of the implied warranty of habitability, her fourth cause of action for negligence, her seventh cause of action for intentional infliction

of emotional distress, and her eighth cause of action for negligent infliction of emotional distress, with leave to amend. Violette is entitled to her costs on appeal.

GOETHALS, J.

WE CONCUR:

IKOLA, ACTING P. J.

THOMPSON, J.